three weeks from that date, or failing this, of consent, as soon thereafter as the Lord Ordinary could give a day, and at the latest by the end of January or the beginning of February. The result of your Lordships' judgment will be that this case will still be hung up for about four months, while according to the statute of 1850 cases should be tried within three weeks unless there be some good reason for delay, if either party desires it. Before the trial can now take place ten months will have elapsed from the date of the summons, and this is much too long a time. There is a difficulty in the way, from the fact that the rolls of the Lord Ordinary before whom the case depends are filled up, but I think that this difficulty might quite well be obviated by remitting the case to the Lord Ordinary, and thereafter having it transferred by the Lord President, in terms of the statute, to a Lord Ordinary who could give an early day.

LORD DEAS was absent.

The Lords refused the motion for trial before a Lord Ordinary, and appointed the cause to be tried at the Spring Jury Sittings in the ensuing year.

Counsel for Pursuers—J. P. B. Robertson. Agent—A. Morrison, S.S.C.

Counsel for Defenders—Mackintosh. Agents—Stuart & Cheyne, W.S.

Saturday, December 24.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MONKHOUSE *v.* MACKINNON.

(*Ante*, January 28, 1881, vol. xviii. p. 284, 8 R. 454.)

Bankruptcy—Ranking—Double Ranking—Extra-judicial Settlement.

Held (*diss.* Lord Shand) that the rule which forbids a double ranking of securities for the same debt on a bankrupt estate applies only where the debtor has been properly divested of his estate in favour of a trustee for behoof of creditors, and not to cases in which he has merely made an extra-judicial settlement.

In this case the following were the facts as they were understood by the parties when in the Sheriff Court, and by the Sheriff-Substitute (ERSKINE MURRAY), from whose judgment this was an appeal:—Hannay & Sons, ironmasters, Glasgow, had a number of transactions with D. L. M'Allum & Company, iron merchants, Newcastle-on-Tyne. Among other transactions there were large contracts for the delivery by M'Allum & Company to Hannay & Sons of pig iron and puddled bars. A portion of these contracts was fulfilled, and bills were granted by Hannay & Sons to M'Allum & Company to the extent of £9106, 3s. 6d., which were discounted by M'Allum & Company in the National Provincial Bank of England and the Bank of England, Newcastle, with the exception of a bill for £326, 9s. 10d., which was retained by M'Allum & Company; and an arrangement was come to between the parties by which 4434 tons still undelivered were repurchased by Hannay & Sons at a difference of price of £6673, 19s. 6d., which therefore became a debt due by Hannay & Sons to M'Allum & Company. On the other hand, Hannay & Sons sold to M'Allum & Company two smaller quantities of iron. For the greater of these M'Allum & Company granted Hannay & Sons bills to the extent of £4541, 4s. 2d., which Hannay & Sons discounted in the National Bank. The price of the smaller lot, 100 tons, being £692, 10s. 7d., remained due by M'Allum & Company to Hannay & Sons.

Both Hannay & Sons and M'Allum & Company became bankrupt. The banks holding the bills claimed on the estates of both parties, were ranked on these estates in respect of the bills (in some cases with rebate of interest), and drew dividends. On the bills by M'Allum & Company the National Bank drew dividends from Hannay & Sons' estate to the amount of £1730, and from M'Allum & Company's estate to the amount of £1362, 7s.

The present case arose out of a claim by G. B. Monkhouse, trustee or assignee on M'Allum & Company's estate, to be ranked on Hannay & Sons' estate for £6303, 3s. 2d., being £6673, 19s. 6d. for the difference in the repurchase, and £321, 14s. 3d. for the bill retained by M'Allum & Company (under deduction of rebate of interest amounting to £4, 15s. 7d.), credit being given for £692, 10s. 7d., the price of the 100 tons of unpaid puddled bars bought by M'Allum & Company from Hannay & Sons. Hannay & Sons' trustee formerly admitted this claim in full (see *ante*, January 28, 1881, vol. xviii. p. 284, 8 R. 454), but by the deliverance at present in question he admitted it only under deduction of £4436, 1s. 5d., the amount (rebate having been deducted) for which the National Bank had been ranked on Hannay & Sons' estate for the bills accepted by M'Allum & Company to Hannays, *i.e.*, he ranked Monkhouse for £1867, 1s. 9d.

Monkhouse appealed.

The Sheriff-Substitute pronounced the following interlocutor:—"The parties having agreed that, in respect of the joint minute of admissions no proof is required, sustains the appeal, and ordains the respondent to rank the appellant on the sequestrated estate of Hannay & Sons for the sum of £6303, 3s. 2d., as craved in the note of appeal."

In his note, after narrating the circumstances as set forth above, the Sheriff-Substitute proceeded:—"The grounds on which Hannays' trustee bases his deliverance are, that these acceptances being the true obligations of M'Allum & Company, the appellant is bound to relieve the respondent thereof; and not having relieved the respondent by taking up the acceptances from the bank, the respondent is entitled and bound to deduct the ranking of said bank in respect of said acceptances from the appellant's claim.

"Though the rules of double ranking seem at variance with the respondent's contention, the question is a somewhat nice one. There is, however, a direct authority in point, viz., the recent case of *Anderson* v. *M'Kinnon*, March 17, 1876, 3 R. 608. The second branch of that case was as follows—Crawford had granted Watson & Campbell acceptances for £4000. These accept-

ances were discounted by banks. Crawford, moreover, had given a guarantee to Watson & Campbell for certain obligations by a third party. Watson & Campbell, Crawford, and the third party, all became bankrupt. The banks ranked on the estates of Watson & Campbell and of Crawford for the £4000 bills, being allotted from Crawford's estate £666, 13s. 4d. as dividend in respect thereof. Watson & Campbell's trustee claimed on Crawford's estate under the gaurantee. Crawford's trustee in dealing with the claim claimed to be relieved from £666, 13s. 4d., and any future dividends on the £4000. It will be observed that thus the only practical difference between the facts of the case of *Anderson* v. *M'Kinnon* and the present is, that in that case Crawford's trustee only deducted the amount of dividend allotted by him on the £4000 bills, while here the trustee claims to deduct the whole of the bank's ranking for the bills altogether.

"Now, in *Anderson* v. *M'Kinnon* the Court held that the banks having already been ranked on Watson & Campbell's estate for the £4000, if Crawford's trustee had claimed on Watson & Campbell's estate for the same sum there would have been a double ranking; and that his proposition to retain the £666 was just an attempt to obtain a double ranking on Watson & Campbell's estate. This view is very clearly brought out in the opinion of the Lord President, who says — 'The right of retention depends on whether there is a debt for which Crawford is entitled to be ranked on Watson & Campbell's estate. I am of opinion that there is not, on the ground that it would be a double ranking for the same debt. The bills for £4000 have been ranked on the estate of Watson & Campbell by the banks. They have received a dividend, and when a bankrupt estate pays a dividend it pays the debt. The banks are also entitled to rank on Crawford's estate because his name is on the bills. But a cautioner is not entitled to rank on the bankrupt estate of the principal debtor which has already paid the debt by a dividend.' Applying this to the present case, the attempt of the respondent to deduct not only the dividends paid to the banks, but the whole ranking of the banks from the claim by M'Allum & Company's trustee, is an attempt to claim a double ranking on M'Allum & Company's estate—a thing which is inadmissible.

"The banks have already been ranked for the same sum on M'Allum & Company's estate; that estate has paid them a dividend, and therefore has paid the debt. Hannays' trustee, though in the position of a cautioner, is not entitled to rank on the bankrupt estate of the principal debtor M'Allum & Company, which has already paid the debt by paying a dividend. But the right of retention depends on whether there is a debt for which Hannays' trustee is entitled to rank on M'Allum & Company's estate. Therefore he cannot retain, against the claim by M'Allum & Company's trustee, the dividend paid by him to the banks in respect of M'Allum & Company's acceptances, and still less, as he now seeks to do, the total amount of these acceptances.

"The respondent bases his argument on the cases of *Gibb* v. *Brock*, May 12, 1838, 16 S. 1002; and *Jamieson* v. *Forrest*, May 25, 1875, 2 R. 701. But of these *Gibb* v. *Brock* was decided on the distinct ground that it was a question between a solvent person and a bankrupt estate, and not one between two bankrupt estates. *Jamieson* v. *Forrest* was decided by the same Division of the Court which in the following year decided *Anderson* v. *M'Kinnon*, and it cannot be believed that the Judge who decided both cases considered that the one was at variance with the other. In *Jamieson's* case it was decided that although a cautioner for the debt of a person who has become bankrupt will not be allowed to rank on the bankrupt's general funds for his loss as a cautioner when the bankrupt has already been ranked for the full debt, if the cautioner holds a lien over any special fund belonging to the bankrupt his right to full indemnity therefrom will not be affected by the ranking of the creditor. In that case the cautioner held a special lien over certain securities in his possession. Out of these securities the Court held that he was entitled to payment. But there is a clear and manifest distinction between such a case on the one side, and the case of *Anderson* v. *M'Kinnon* and the present case on the other, there being no special lien in the latter cases at all.

"Reference has also been made on both sides to a number of English cases; of these there is a class of cases of which *ex parte Walker*, 4 Vesey 373, is typical, in which it has been held that where there are cross accommodation bills between two firms, both of which become bankrupt, there is, as between the two estates, no ranking in respect of the bad paper, or any excess on the one side above the other. But this is a state of matters entirely absent from the present case, where all the bills were granted for value, and had nothing to do with the bills granted by the other party.

"A case of somewhat more importance, quoted for M'Allum & Company's trustee, is *ex parte Macredie*, March 21, 1873, 42 L.J. Bankruptcy, p. 90. In that case Parker advanced £11,823 to Charles, and got bills by Charles for £7487 in partial repayment. Parker had also accepted bills to Charles for £13,000 for goods which were never delivered. The bills all got into bankers' hands, who claimed and were ranked on both estates. Parker was not allowed to claim on Charles' estate for the £11,823 without deducting the £7487, in spite of the existence of the £13,000 claim by the banks. The ground of judgment, as given by the Lord Chancellor Selborne, was, that the true principle to be applied in these cases was that proof should only be admitted (or as we would say, a claim could only be sustained) for that sum for which an action could have been maintained by one party against the other if the bills had remained in the situation in which they were actually found, and there had been no bankruptcy. Thus there could be no action on the bills which had passed into the banks' hands. As it would have been put in our Court, the money lent, to the extent of the £7487, had been practically repaid. To that extent another creditor (the bank) had claimed and received a dividend. Therefore the debt by Charles to that extent was paid, and Parker's trustee in claiming for it was asking a double ranking. The Lord Chancellor distinguishes between this state of matters and that where two sets of accommodation acceptances were given against each other. The above case of *Macredie* is evidently a strong corroboration of that of *Anderson* v. *M'Kinnon*, which, however, is that which is most absolutely in point."

Mackinnon appealed to the Court of Session. In argument he admitted that if the respondent Monkhouse was in the position of a proper trustee in bankruptcy on the estate of M'Allum & Co., as had been assumed by the Sheriff-Substitute and the parties, the case was ruled by *Anderson* v. *M'Kinnon*, referred to by the Sheriff-Substitute, and the appeal could not be maintained; but the appellant contended that this was an erroneous view of the respondent's legal position, inasmuch as M'Allum & Co. had arranged with their creditors extrajudicially, and that in consequence the case was within the principle of *Gibb* v. *Brock*, also referred to by the Sheriff-Substitute, to the effect of allowing the appellant to deduct from the respondent's claim the amount of the dividend which had been paid from Hannay & Sons' estate on the bills granted to them by M'Allum & Co.

After hearing parties the Court allowed "the parties to add to their minute of admissions a precise statement of the claim, and Monkhouse's title and interest as the creditor on the sequestrated estate of Hannay & Sons." In terms of this interlocutor the parties concurred in admitting, *inter alia*, the following documents:—

"I.—Deed of Composition and Discharge between D. L. M'Allum & Co. and their Creditors, dated 22d June 1874.

"This deed, made on the 22d day of June 1874, between Duncan Livingstone M'Allum, William Patterson, and William Fenwick M'Allum, all of the borough of Newcastle-upon-Tyne, iron and commission merchants, now or lately carrying on business in copartnership under the style or firm of 'D. L. M'Allum & Co.,' hereinafter called the said debtors, of the one part, and the several persons whose names and seals are hereunto set and affixed, being creditors of the said 'D. L. M'Allum & Co.,' of the other part—Whereas the said debtors, being indebted to the said several creditors in the sums of money set opposite to their respective names at the foot of these presents, lately proposed to pay to them a composition of 5s. in the pound, and a further sum of 1s. in the pound, or a rateable proportion thereof, on certain events which did not happen, and also to assign to George Benson Monkhouse, of Newcastle-upon-Tyne aforesaid, public accountant, a debt or claim of £6307, 18s. 9d. upon the estate of Hannay & Sons, of Glasgow, ironmasters, and which proposal the said creditors agreed to accept; and whereas, by a deed bearing even date herewith, the said debt or claim hath been assigned to the said George Benson Monkhouse upon trust for the said creditors; and whereas the said creditors have respectively received the several sums of money set opposite to their respective signatures;" therefore the creditors proceeded to discharge the debtors. The National Bank of Scotland, the holders of M'Allum & Co.'s bills to Hannay & Sons, did not concur in this discharge.

"II.—Assignment by Messrs D. L. M'Allum & Co. to George Benson Monkhouse, the respondent, dated 22d June 1874.

"This indenture, made the 22d day of June 1874, between Duncan Livingston M'Allum, William Patterson, and William Fenwick M'Allum, all of the borough of Newcastle-upon-Tyne, iron and commission merchants, now or lately trading under the style or firm of D. L. M'Allum & Co., and hereinafter referred to as the said debtors, of the one part, and George Benson Monkhouse, of the same place, public accountant, of the other part—Whereas the said debtors lately suspended business, and at a meeting of their creditors, held on the 24th day of April last, it was resolved that the creditors should accept a composition of 5s. in cash, and a further 1s., or a proportionate part thereof, on certain events, which have not happened, in addition to the said composition; it was also resolved that the said debtors should assign unto the said George Benson Monkhouse, for distribution amongst the creditors of the said firm, a certain claim or debt on the estate of Thomas Hannay & Sons, ironmasters in Glasgow, amounting to the sum of £6307, 18s. 9d.; and whereas the said debt or claim has been proved by the said debtors upon the said estate of the said Thomas Hannay & Sons; and whereas the said composition of 6s. in the pound has been duly paid to the said creditors whose names and debts are specified in the schedule hereunder written; and for carrying the said agreement as to the said debt and claim on the estate of Thomas Hannay & Sons into effect, the said debtors have agreed to execute these presents—Now this indenture witnesseth that in pursuance of the said agreement, and for carrying the same into effect, and in consideration of the sum of 5s. sterling to the said debtors paid by the said George Benson Monkhouse, on the execution hereof, the receipt whereof is hereby acknowledged, they the said debtors do, and each of them doth, hereby transfer and assign unto the said George Benson Monkhouse, his executors, administrators, and assigns, all that the debt or claim of £6307, 18s. 9d., on the estate of the said Thomas Hannay & Sons, and all dividends and other moneys payable in respect thereof, and all the estate and interest of the said debtors therein and thereto, to have, hold, receive, and take the said debt, or claim, dividends, and other moneys unto the said George Benson Monkhouse, his executors, administrators, and assigns, upon and for the trusts, intents, and purposes hereinbefore mentioned—that is to say, upon trust as and when the same shall be received by the said George Benson Monkhouse, to pay and divide the same to and amongst the said creditors of the said debtors, rating in proportion to their several and respective debts; And the said debtors do hereby absolutely and irrevocably appoint the said George Benson Monkhouse, his executors and administrators, their true and lawful attorney and attorneys for them, in their names, or in the name or names of the said George Benson Monkhouse, his executors and administrators, to receive of and from the estate of the said Thomas Hannay & Sons, or the trustees thereof, the moneys hereby assigned, and to give effectual receipts for the same, and also, if necessary, to sue for and recover the same—all expenses of receiving and recovering the same to be at the expense of the said George Benson Monkhouse, his executors and administrators; And the said George Benson Monkhouse hereby for himself, his heirs, executors, and administrators, covenants with the said debtors, their heirs and assigns, that he the said George Benson Monkhouse shall and will, as and when the said moneys shall be received, pay and divide the same to and amongst the said creditors; and also shall and will save harmless and keep indemnified the said Duncan Livingston M'Allum, William Patterson, and William Fenwick M'Allum

by and from all costs and expenses attending the receipt or recovery of the moneys hereby assigned." The National Bank of Scotland were among the creditors referred to in this assignation as having received 6s. in the pound, their debt being set forth as £4541, 4s. 2d.

After further argument, the nature of which fully appears from the opinions *infra*, the Lords made avizandum.

At advising—

LORD PRESIDENT—The appellant is trustee on the sequestrated estate of Hannay & Sons, ironmasters in Glasgow. The sequestration was awarded on the 28th March 1874. On the 2d of June thereafter D. L. M'Allum & Company, ironmasters, Newcastle-on-Tyne, lodged a claim on the bankrupt estate for £307, 18s. 9d. On the 7th June 1880 the appellant, as trustee in the sequestration, pronounced a deliverance on this claim in the following terms:—"In respect that the claim by the National Bank of Scotland amounting to £4436, 1s. 5d., for acceptances of D. L. M'Allum & Company to Hannay & Sons, has not yet been withdrawn, the trustee rejects this claim to that extent, and ranks the claimant only for the balance of £1867, 1s. 9d., said acceptances being the true obligation of D. L. M'Allum & Company, and the same not yet having been entered by them, the same falls to be deducted from their claim as lodged."

Against this deliverance the respondent in this Court, G. B. Monkhouse, having acquired right by assignation to the claim lodged in this sequestration by M'Allum & Company, presented an appeal to the Sheriff, which, by his interlocutor of 22d August 1881, was sustained, and a remit made to the trustee to rank the assignee in terms of the claim with a small deduction for rebate of interest.

Hannays' trustee has in his turn become appellant in this Court, and the question for decision is, whether the deliverance of the trustee is to be upheld in whole or in part, or the interlocutor of the Sheriff-Substitute is to be affirmed?

Hannay & Sons and M'Allum & Company had numerous transactions in iron, and there was also accommodation paper passing between them. The details of these transactions are unimportant; it is sufficient to know that the claim of M'Allum consists of a bill debt of £326, 9s. 10d. granted for the price of iron sold by M'Allum to Hannays, and of £6046, 10s. and £627, 9s. 6d., being the amount of damage agreed upon and admitted to be due by Hannays to M'Allum for failure to implement certain contracts. These three sums amount to £7000, but the aggregate is subject to deduction of £692, 10s. 7d., and also £4, 15s. 7d. for rebate of interest on the bill from the date of the sequestration till its maturity. This leaves the sum of £6303, 3s. 2d. as the true amount of the claim of M'Allum & Company and their assignee.

The trustee does not dispute that this is a just debt, but he maintains that he is entitled to retain the amount in whole or in part till M'Allum & Company or their assignee shall relieve the bankrupt estate of the amount of a dividend which the trustee has been obliged to pay on certain bills held by the National Bank of Scotland, amounting after rebate of interest to £4436, 1s. 9d., on which bills M'Allum & Company are the acceptors and true debtors. The amount of the dividend so paid is £1730, and this sum the trustee proposes to deduct from the £6303, 3s. 2d. on which M'Allum & Company and their assignee claim in the sequestration.

It must be observed that this is a different proposal from that expressed in the trustee's deliverance, and much more favourable to the claimant. In the deliverance the trustee deducted the total amount of M'Allum & Company's bill debt due to Hannay from the amount of M'Allum's claim, and proposed to rank them for the balance, £1867, 1s. 9d. But this was obviously an untenable position—all that the bankrupt estate can claim to be relieved of is the amount of the dividend that it has been forced to pay or might have to pay on account of the bankrupt being liable to the bank as drawer or indorser of the bills accepted by M'Allum & Company. The amount of dividend actually paid is £1730, and if there is a final dividend the result will be that the claimant will be entitled to rank for the amount of his claim, subject only to the deduction of this £1730.

All this would be clear enough were it not that the claimant Monkhouse has maintained and convinced the Sheriff-Substitute that there is here not one bankruptcy but two—that M'Allum & Company have become bankrupt and been divested of their estate just as much as Hannay & Sons, and that Monkhouse is in possession of that estate for the benefit of their creditors. This, I think, can be shown to be an entire mistake both in fact and law. But I am not all surprised that the Sheriff-Substitute should have fallen into this error, considering the very loose and incautious language of Hannays' trustee throughout the whole course of the pleadings in speaking of M'Allum & Company as bankrupts, and of their estate as a sequestrated estate.

If M'Allum & Company's estate had been sequestrated, or had been by any corresponding proceeding in England transferred from them to a trustee for behoof of their creditors, the case would have been very different, and the right of Hannays' trustee to deduct from the amount of claimants' debts the dividend paid to the National Bank would have been met by the objection that such a retention or set-off would have been equivalent to a double ranking on the bankrupt estate of M'Allum & Company for the debt constituted by the bills in the hands of the National Bank, assuming of course that the bank ranked on M'Allum's estate — *Anderson* v. *M'Kinnon*, 3 R. 608.

But according to the view I take of the facts before us, the estate of M'Allum & Company never was in such a position that it could be subjected to what the law calls a double ranking.

It is true that M'Allum & Company were so much embarrassed by the failure of Hannay & Sons that after they had lodged their claim in this sequestration they were obliged to call a meeting of their creditors and come to an arrangement with them. But so far from their being made bankrupt or being in any way divested of their estate, all their creditors agreed at once to take a compensation of 6s. per pound and to discharge them of their debts on the further condition that one asset of their estate only, viz., the claim which had been lodged in this sequestration, should be assigned to Monkhouse for their behoof. This assignation was accordingly exe-

cuted by M'Allum in favour of Monkhouse, and duly intimated to the trustee in this sequestration.

It is this assumption which creates the apparent difficulty of the case. Had M'Allum himself continued a claimant in this sequestration, he must have submitted to the deduction now proposed by the trustee, just as clearly as if he had never been insolvent. This very point was decided so long ago as 1838, in the well-known case of *Gibb* v. *Brock*, the best report of which is to be found in the Faculty Collection under date May 12, 1838. The facts may be shortly stated. Buchanan & Young were sequestrated on 23d June 1835. At that date they were owing Gibb a balance on cash transactions of £1530. There were many accommodation bills between them in the circle to the extent in all of £9686. Of these £6886 were for the accommodation of Buchanan & Young, and £2800 for the accommodation of Gibb. Gibb also became insolvent, but settled with his creditors for a composition of 5s. per pound, and obtained his discharge. The holders of all the bills ranked on the bankrupt estate of Buchanan & Young, and received a composition of 5s. from Gibb. In these circumstances Gibb lodged a claim on Buchanan & Young's sequestration for the amount of the cash balance due to him, £1530, but it was rejected by the trustee, "because the estate of Buchanan & Young has been ranked upon for bills to the extent of £2800 granted by them for the accommodation of Gibb, and from whom they received no value, and until these bills are retired by the claimant, and the estate thus relieved of the extra ranking occasioned by his inability to retire his own obligations, no ranking can be admitted at his instance." Gibb brought this deliverance under the review of the Court, and founded on the rule against double ranking, which he said would be violated if he were bound first to pay 5s. in the pound to the holders of the bills for £2800, and then to relieve Buchanan & Young's estate of the ranking for the same bills to which it was subjected. But the Court approved of the principle of the trustee's deliverance, and appointed a dividend to be set aside for Gibb till he should relieve the estate of Buchanan & Young of the ranking of the holders of the £2800 bills.

Now, except that we have here the assignee of M'Allum instead of M'Allum himself, the two cases are exactly parallel. For here, as there, the bankrupt's estate is relieved of the dividend paid to the holder of the bills, in which M'Allum was truly debtor, while M'Allum has paid 6s. per pound to the holders of the bills in which Hannays were the true debtors, and yet is prevented by the rule against double ranking from obtaining any relief against Hannays' estate.

The only question, therefore, which remains for consideration is, whether M'Allum's assignee is in any better position than M'Allum himself would have been claiming in Hannay & Son's sequestration. The general rule *assignatus utitur jure auctoris* must apply, unless Monkhouse as assignee can show that the giving effect to the trustee's claim of retention or set off would be to violate the rule against double ranking.

I am of opinion that the latter rule applies only where there is a bankruptcy in the proper sense of that term, and that the estate of M'Allum never was a bankrupt estate.

In a proper bankruptcy the debtor is completely divested of his estate, and the trustee is completely invested the property of that estate for behoof of the creditors. There is thus a separation of interests between the bankrupt and what was his estate. When the estate is divided among the creditors the estate has paid the debts so far as concerns the estate and the trustee who holds it, and of course the estate and the trustee are discharged of such debt in consideration of the dividend paid on it. But not so the bankrupt. He has not paid the debt. He remains personally liable for the whole balance of the debt beyond the dividend unless under the indulgent provision of the Bankruptcy Laws he succeeds in obtaining his discharge. Until he obtains his discharge he remains personally liable, and if through dishonesty or fraud he never gets a discharge his personal obligation is perpetual, and will transmit as an obligation against anyone who is rash enough to represent him.

This is the foundation of the doctrine of double ranking. The debt being paid to the creditors by the bankrupt estate, the circumstance that that debt was secured to the creditors by a subsidiary obligation of another party who has relief against the bankrupt to the extent to which he has contributed to satisfy the creditors, cannot be allowed to affect the bankrupt estate, because equity intervenes to protect the other creditors against the demand that the estate shall pay the debt in the form of dividend, first to the proper creditors, and then to the surety claiming in relief. But for this equitable rule the other creditors would not receive their proportionate share of the bankrupt estate.

But M'Allum never was a bankrupt—never was divested of his estate—but purchased a discharge of all his debts by paying a composition to his creditors. His estate never belonged to his creditors, or to any trustee for their behoof, and thus there never was any separation or distinction of rights and interests as between the insolvent and his estate. There was no ranking of his creditors, and therefore there could not be a double ranking. There was no payment of the debts of his creditors, but only a purchase of a discharge from these debts for a consideration stipulated and agreed to.

That one part of the consideration for the discharge is an assignation to a claim against a bankrupt estate makes no difference in principle. His creditors take that asset for what it is worth. It cannot be made better by being assigned, nor can it by any arrangement or understanding between the parties to the composition arrangement be fortified against any legal objections or equities by which it is liable to be met in the sequestration in which it is made. In short, the assignee cannot be in a better position than his cedent in a question with the cedent's debtor.

It was further contended that Hannays' trustee is not entitled to claim the £1730 by way of retention, because he could not have insisted in participating in the composition arrangement as a creditor of M'Allum, and receiving 6s. in the pound like M'Allum's other creditors. But the plain answer is that he could make no claim against M'Allum, because he was owing him a much larger sum, and therefore could give effect to his own smaller claim only by way of compensation or retention, as he now does.

The case has been in some respects a troublesome one, but only because both parties were in fault in not at once disclosing the true state of the facts. Now that that has been ascertained, I do not feel any difficulty in the application of the legal principles on which the case depends.

Lord Deas—This case was fully considered at consultation some time ago, when your Lordship explained the opinion you had formed upon it and the grounds of that opinion. In that opinion and in these grounds I entirely concurred, and as I have not seen any reason to change my mind I think it sufficient to say now that I concur.

Lord Mure—I also concur. The main difficulty has been to find out the exact facts of the case, and I agree that the true facts are as your Lordship has put them. The question is, whether in admitting this claim to rank on the estate of Hannay & Sons the respondent is bound to admit it to its full amount of £6303, 3s. 2d., which sum is the net result of a variety of transactions between Hannay & Sons and M'Allum & Company, or whether he is entitled to deduct any part of that sum? Now, that really depends on this other question, Was there in this case one bankruptcy or were there two? The matter undoubtedly got into some confusion in the Sheriff Court, for the appellant was described in the pleadings as "the trustee on the sequestrated estate of M'Allum & Company," but it has ultimately come out quite clearly that M'Allum & Company's estate has never been sequestrated according to the procedure of our Scotch law, and has never been made bankrupt according to English law. There has been a composition arrangement, but beyond that nothing to divest the bankrupt of his estate. I think, therefore, that the case is within the rule settled in *Gibb* v. *Brock*, and that Hannays' trustee is entitled to retain the amount that has been paid on the bills in question.

Lord Shand—The appellant, the trustee on the sequestrated estates of Hannay & Sons, has by his deliverance made the claim of the respondent Mr Monkhouse for a ranking of £6307 odds subject to a deduction of £4436, and the argument submitted on his behalf was that the deliverance should be sustained to its full effect. Your Lordships do not propose to give effect to this argument to the extent of allowing a deduction of £4436, but a deduction will yet be made from the respondent's claim of between £1700 and £1800, being the composition paid by the appellant on the larger amount of £4436. After the best consideration of the argument and your Lordships' views, I find myself unable to agree in that decision, being of opinion that the deliverance of the Sheriff ought to be adhered to.

The record is certainly in a very unsatisfactory state, but by resorting to different parts of the prints—three in number—which have been laid before us the facts necessary for judgment may be ascertained, and may be thus generally stated:—On 28th March 1874 the estates of Hannay & Sons, who were ironmasters in Glasgow, were sequestrated, and it was explained to us that the immediate and necessary consequence of that bankruptcy was that M'Allum & Company, ironmasters in Newcastle-on-Tyne, who had large dealings with Hannay & Sons, were obliged to stop payment and declare themselves insolvent. They called their creditors together, and it appears, from the record and the documents put into process since the case came into this Court on appeal, that on the 24th of April the creditors met, and the result of the meeting was that a formal adjudication of bankruptcy was avoided. The insolvency was not of a temporary nature only. There was no room for the suggestion that with time for realisation the estate could possibly produce enough to give full payment to the creditors. M'Allum & Company declared themselves to be utterly unable to meet their debts, and satisfied their creditors that their estate was bankrupt, and could only pay a composition of 5s. or 6s. in the pound, with the small additional composition which might be realised from their claim for £6307 as creditors on Hannay & Sons' bankrupt estate. They accordingly offered a composition, with an assignment to a trustee for their creditors of the claim now in question (which had been sometime before given in to the appellant) in return for a discharge, and in order to avoid the "expense and delay of bankruptcy proceedings for the realisation and division of their estates;" and to this offer their creditors agreed. This appears very clearly from two documents which are printed. The first is a deed of composition and discharge dated 22d June 1874, in which it is set forth that the debtors M'Allum & Company being indebted to the several creditors in the sums of money set opposite to their names, proposed to pay them a composition of 5s. in the pound, and the further sum of 1s. in the pound, or a rateable proportion thereof, on certain events which did not happen, "and also to assign to George Benson Monkhouse of Newcastle-upon-Tyne aforesaid, public accountant, a debt or claim of £6307, 18s. 9d. upon the estate of Hannay & Sons, of Glasgow, ironmasters, and which proposal the said creditors agreed to accept; and whereas by a deed bearing even date herewith the said debt or claim hath been assigned to the said George Benson Monkhouse upon trust for the said creditors; and whereas the said creditors have respectively received the several sums of money set opposite to their respective signatures," therefore the several creditors discharged the debtors of their liability for the debts due. On the same day M'Allum & Company executed the other document, viz., an assignment, which proceeds on the narrative that "Whereas the said debtors lately suspended business, and at a meeting of their creditors held on the 24th day of April last it was resolved that the creditors should accept a composition of 5s. in cash, and a further 1s., or a proportionate part thereof, on certain events which have not happened, in addition to the said composition—it was also resolved that the said debtors should assign unto the said George Benson Monkhouse, for distribution amongst the creditors of the said firm, a certain claim or debt on the estate of Thomas Hannay & Sons, ironmasters in Glasgow, amounting to the sum of £6307, 18s. 9d.; and whereas the said debt or claim has been proved by the said debtors upon the estate of the said Thomas Hannay & Sons; and whereas the said composition of 6s. in the pound has been duly paid to the said creditors whose names and debts

are specified in the schedule hereunder written; and for carrying the said agreement as to the said debt and claim on the estate of the said Thomas Hannay & Sons into effect, the said debtors have agreed to execute these presents," by which the claim is assigned accordingly to Mr Monkhouse as trustee for the creditors, the amount received to be divided amongst them in proportion to the debts due to them, therefore the deed assigns the claim to Mr Monkhouse accordingly. M'Allum & Company had avowed that their estate was insufficient to meet their debts. The creditors were satisfied of this, and consented to M'Allum & Company retaining or purchasing the estate from them and avoiding a bankruptcy by paying a small composition, and giving the creditors the right to the claim now in question, which was mentioned in the assignation as having been "proved by the said debtors upon the said estate." The claim upon Hannay & Sons' estate having been lodged with the appellant by M'Allum & Company pending the arrangement with their creditors, and having been assigned to the respondent in this way, intimation of the assignation was sent to and acknowledged by the appellant as trustee in Hannay & Sons' sequestration.

It is now necessary to look at what this claim consisted of. The particulars of it are given in one of the prints I have referred to. It was a claim arising out of a transaction which was entirely separate from any of the bill transactions to which I shall immediately refer. It appears that M'Allum & Company had sold two large quantities of iron to Hannay & Sons, for which that firm in consequence of their insolvency at the time of delivery were unable to pay. In consequence of this breach of contract on their part, it was arranged that M'Allum & Company should rank on their estate for damages, being the difference between the market price of iron at the time when the iron was sold and the price to which it had fallen when delivery should have been taken, and accordingly two items, one of £6046, 10s., and the other £627, 9s. 6d., of the claim in question arose in this way. The other item in the claim is an acceptance of Hannay & Sons for £326, 9s. 10d. for iron sold and delivered to them, and which acceptance is now in the respondent's possession, having been handed to him as the voucher of part of M'Allum & Company's claim against Hannay & Sons.

From these sums, amounting in all to £7000, 9s. 4d., there falls to be deducted the sum of £692, 10s. 7d., being the price of a quantity of iron sold and delivered by Hannay & Sons to M'Allum & Company, and the balance of the claim in favour of M'Allum & Company is thus £6307, 18s. 9d.

The claim arises out of an onerous transaction, and there can be no question that M'Allum & Company, or their trustee for their creditors, is entitled to a ranking for the amount as a good debt unless there be a proper legal ground which entitles the appellant to make the deduction which he proposes. The question here is, Is there any right to make that deduction? The alleged right to do so is rested on the ground of other transactions, and it is necessary to ascertain what these transactions were. They consisted of sales and deliveries of iron by each of the parties to the other at different times, and of bills granted on account of these sales. On the one hand, M'Allum & Company had sold and delivered iron to Hannay & Sons of the value of £9106, 3s. 6d. They got acceptances for that sum, and these acceptances had been discounted with the exception of the bill for £321, 14s. 3d. already mentioned. These acceptances by Hannay & Sons for value were dishonoured, and consequently the banks which held them claimed and were ranked for the amount on M'Allum & Company's estate, so that M'Allum & Company have had claims ranked upon their estate to the extent of nearly £9000, which were not their debts, but the debts of Hannay & Sons. On the other hand, Hannay & Sons had sold and delivered iron to M'Allum & Company, and for the price M'Allum & Company had granted their acceptances, but it is to be observed that the sum in this case is about one-half only of what it is in the other. The sum for which M'Allum & Company had granted acceptances was £4541, 4s. 2d. The bills for that amount got into the hands of a bank, having been discounted. These bills having been also dishonoured were ranked upon both estates, so that Hannay & Sons' estate had to submit to a ranking to the extent of £4541 for what was truly M'Allum's debt. The result of these bill transactions for the price of iron sold and delivered was this, that while Hannay & Sons had to submit to a ranking for £4541 which was not their debt, M'Allum & Company had to submit to a ranking of nearly double that amount which was truly Hannay & Sons' debt. It must be observed that all of these bills represented onerous transactions. I see no trace of any accommodation paper between the parties.

Now, in that position of matters, the claim now in question having been given in, it does not seem to have occurred to the appellant that he had grounds for rejecting it to any extent. Accordingly by his deliverance of August 1874, about five months after the date of the sequestration, he admitted the claim. From that time down to 7th June 1880 the claim remained in that position. On that date, however, the appellant issued a new deliverance, in effect recalling what he had formerly done, and sustaining the claim only to a limited extent by making a deduction from its amount of £4436, 1s. 5d., the ground of the new deliverance being thus stated, that he did so "in respect that the claim by the National Bank of Scotland for a sum amounting to £4436, 1s. 5d. for acceptances of D. L. M'Allum & Company to Hannay & Sons had not yet been withdrawn." I see it is stated by the appellant on the record that the claim of the National Bank was lodged after the date of the first deliverance. I do not know whether the parties are agreed about this, but whether the fact is so or not is not material, because I cannot doubt that the appellant must have known that these bills were in the circle, and that having been discounted they would come in as claims upon the bankrupt estate by the banks which held them. In this state of the facts it appears to me that if the deduction claimed, or a material part of it, be allowed, the result will be most inequitable, because not only will there be substantially a double ranking on the estate of M'Allum & Company, to the detriment of their creditors, now claiming by a trustee, of the bills for £4541 already ranked, but the appellant, the trustee on Hannay & Sons' estate, will get the benefit of this second

ranking for the estate which he represents, although the bankrupts Hannay & Sons themselves have dishonoured bills for nearly double that amount, which have consequently been ranked on M'Allum & Company's estate.

It seems to be admitted in the argument, and not doubted by your Lordships, that the appellant's view could not be sustained if these were both bankrupt estates—that is, if M'Allum & Company had been also formally adjudicated bankrupts — and the first question for consideration is, whether the case is not one in which that is substantially the position of the parties? On this question I differ in opinion from your Lordships. The rule applicable to cases of this kind—questions of double ranking —is not a statutory rule. It is a rule introduced on principles of equity, and the purpose of the rule is really to secure that justice shall be done as between a body of creditors who are compelled to take less than their full debt, and another body of creditors who are in the same position, in the dealings of the two estates with each other. Accordingly, it appears to me that if instead of two estates being formally adjudicated bankrupt by sequestration, trust-deeds are granted acknowledging and avowing, consistently with the fact, an insufficiency of both estates to meet the debts charged on them, and trustees appointed, the creditors consenting, the Court would apply the same principles as in the case of sequestrated estates. In the present case M'Allum & Company were to all effects bankrupt, and were so dealt with by their creditors; and nothing can more clearly show this than the fact that their creditors are now suing this action through a trustee who obtained right to this asset of their estate in order to enable them to eke out the composition which is all they can recover on the debts due to them. The case is in this respect plainly distinguishable from that of *Gibb* v. *Brock*, on which your Lordships' judgment proceeds, and to which I shall afterwards refer. The Bankrupt Statute in England authorises a liquidation by arrangement, that is, by a composition arrangement, without any adjudication in bankruptcy, and substantially such an arrangement here took place.

I am further of opinion, however, that the contention of the respondent Mr Monkhouse, that the appellant is barred by what has occurred in his dealings with M'Allum & Company from now maintaining that their estate is to be regarded as otherwise than a bankrupt estate is well founded; for I think that from first to last throughout all the proceedings the appellant acted on the footing that these were both bankrupt estates, and that the accounts between the estates were to be settled on that footing, and that he led those who were acting for the creditors of M'Allum & Company to act in reliance on this, so that if he be now allowed at the eleventh hour to take up a different position a clear injustice will be done. M'Allum & Company had, as I have said, declared themselves insolvent in the sense already explained immediately upon Hannay & Sons' bankruptcy. They afterwards lodged this claim in the sequestration, to keep it open for their creditors, and having done so, they, on 22d May 1874, very early in the history of these proceedings, wrote a letter in these terms to the appellant, Hannay & Sons' trustee:—"We are anxious to get our estate closed, and the arrangement is that we assign all beneficial interest we may have in Hannays' estate to a trustee for the equal benefit of our creditors; and to enable us to do this, we want first, the proofs on Messrs Hannay's estate, and second, to have some idea what Messrs Hannay are likely to pay." There, I take it, was very distinct intimation to Mackinnon as to the position in which this estate was—M'Allum & Company assigning this claim to their creditors in part payment of a composition on the debts they could not meet. What was the reply to that letter from the appellant?—"I duly received your letter of the 22d. I am aware of the arrangement made anent your claim upon this estate (Hannay & Sons), and all you have to do is to assign your claim as lodged to the party who is appointed to hold it in trust, and to intimate the assignation to me as trustee." I think that was an intimation to M'Allum & Company that Mr Mackinnon was fully aware of the position of their estate as an utterly insolvent estate—that he knew the creditors could only get a composition on their debts; and I think the persons who received that letter were fairly entitled to act upon the view that Mr Mackinnon was treating the estate as no longer solvent but substantially bankrupt. If he had intended to take up the position "Your estate is solvent, and I shall deal with you on that footing," I think he was bound to do so at that stage. If he meant to keep it open to himself to act otherwise, his answer was a misleading one. If he meant to leave it open for himself afterwards to maintain that he was entitled to account with M'Allum & Company on the footing that they were solvent, I think he was called on to give notice of this. If he had said to them—"I have received your letter; I am aware of the arrangement, but take notice I am to deal with your estate as a solvent one,"—what would have occurred? Immediately a proceeding equivalent to a sequestration—an adjudication in bankruptcy—would, and at least might, have been resorted to—on a petition for liquidation by arrangement, that is, by composition arrangement, in which case the appellant could not have maintained his present argument. M'Allum & Company having got this letter, were, I think, entitled to act on the view that they would be dealt with as bankrupts, that a formal adjudication or petition for liquidation by arrangement was not necessary, and also to represent, as they did, to their creditors that their claim was proved, at least so far as any objection of the kind now insisted on was concerned.

But the acting of the appellant does not stop there. His original deliverance indicates no such position as he has now taken up, for he thereby sustained the claim *in toto* with the exception of a trifling rebate of interest. The pleadings in the case also show what the views of the parties were on this matter, and it seems to me that they were agreed that the case was to be considered as one of accounting or ranking as between two bankrupt estates. In the appeals the respondent Monkhouse is designed as "trustee on the sequestrated estate of M'Allum & Company," and no exception is taken to this by the appellant, while the minute of admissions on which the Sheriff's judgment proceeds contains this statement—"Neither of the bankrupt estates has yet been finally wound up, and further dividends may be

paid therefrom ;" and that is signed by the agents for both parties. It is after all this that the appellant, in order to take such benefit as he may gain from the decision in the case of *Gibb* v. *Brock*, takes the point that this is not the case of a claim on behalf of a bankrupt estate at all, and asks the Court to deal with it on that footing. I am of opinion that the appellant is precluded from now taking up that position, and if I be right in this view the case of *Gibb* v. *Brock* has no application.

I think it right to say further, however, that I am not satisfied that even if M'Allum & Company are to be taken as having continued solvent contrary to the fact, the appellant is entitled to make this deduction demanded from their claim. The case is not one such as has frequently occurred of accommodation bills on both sides, where special rules have been introduced and are applicable. Each of the various transactions was for a valuable consideration. And it appears to me that even if M'Allum & Company were solvent when it is proposed to deduct the dishonoured acceptances for £4451, which M'Allum & Company ought to have retired, from the amount of their claim of £6307, they have a good objection to the deduction in the fact that they were obliged to pay a larger amount of Hannay & Sons' proper debt—having had to pay a composition on bills for £9000 which Hannay & Sons ought to have retired. The appellant is, I think, precluded on grounds of equity from demanding payment of the bills amounting to £4541, or bringing these bills into account against the present claim, because against these bills M'Allum & Company, or their trustee, can set off the much larger amount of Hannay & Sons' acceptances they have been obliged to pay. Suppose M'Allum & Company had not claimed at all on Hannay & Sons' estate, or that they had no separate debt on which they could claim, could Mackinnon, as trustee on Haunays' estate, have claimed to be relieved of the ranking for the bills for £4451, either as against M'Allum & Company or their trustee? I apprehend not. If he made such a claim, he would be met with the reply that M'Allum's estate had been obliged to pay a great deal more than the amount claimed, because of Hannay & Sons' dishonoured acceptances. In the case of *Anderson* v. *Mackinnon*, which has been founded on, your Lordship in giving judgment made the observation—"The right of retention depends on whether there is a debt for which Crawford is entitled to be ranked on Watson & Campbell's estate;" and Lord Ardmillan observed—"The right of retention by Crawford depends on the right of Crawford to rank on Watson & Campbell's estate. If he had no such right, he cannot retain." If that be the test—if the test of the right to retain be the right to rank for the sum retained—I put the question in this case, Is this claim for £4451 a claim for which Mackinnon, as Hannays' trustee, was entitled in any view to rank on the estate of M'Allum & Company? In my opinion it is not, for the reason that M'Allum & Company had been required to pay, and had already paid, a larger amount on account of Hannay & Sons' proper debt. It follows, therefore, as it seems to me from the law laid down in *Anderson* v. *M'Kinnon*, that the deduction claimed cannot be made good; for it is, I think, made clear that the appellant could not have successfully claimed on M'Allum & Company's estate.

I think it right to say, however, that I am not satisfied of the soundness of the view that according to our law of bankruptcy the claim of retention depends upon whether the party retaining is entitled to make a claim and to rank as a creditor. On the contrary, it appears to me that on principle and authority it is recognised that a party is entitled to the benefit of a security, heritable or moveable, or may effectually plead a right of compensation or retention (which is practically a security) against a trustee on a bankrupt's estate, with reference to a debt that has been already ranked on that estate, and with the result of indemnifying himself from payments made in respect of liability for the debt so ranked. Thus, if a person has accepted a bill for the accommodation of the bankrupt, only on condition of getting a pledge or other security, and the bank with which the bill was discounted has ranked for the amount on the bankrupt estate, the trustee cannot demand the pledge or security on the ground that the estate "has paid the debt." The security-holder is entitled to retain the security for which he stipulated to indemnify himself for his liability to the bank, and his so doing is not a violation of the rule against double ranking. Payment of the dividends by a bankrupt estate is no doubt full payment of the debt to this effect, that in no way, directly or indirectly—that is, by the creditor himself or any third party for his benefit,—can a claim be allowed to a second ranking, or payment a second time of dividends on the same debt. If, however, a person has a security over the bankrupt estate, the trustee claiming against the security-holder for delivery of the security as being the property of the bankrupt, cannot deprive the security-holder of his right of indemnity on the ground that the debt for which the security was given has been ranked, and so paid in full by the bankrupt estate, for this would in effect deprive the security-holder of the benefit of the security for which he stipulated when he undertook the obligation for the bankrupt. And so as to the right of retention or compensation. If the trustee sue a person for a debt admittedly due to the bankrupt estate, it appears to me he may be successfully met by a claim of retention in respect of any payment by that person on account of bills accepted, or any other obligation undertaken for what is truly the debt of the bankrupt, even although these bills have been already ranked on the bankrupt estate. The distinction to be drawn and observed is between a claim twice made for a ranking of the same debt, and a claim to indemnification by one who by his security is able to indemnify himself, although the effect will be to cover himself for liability in regard to a debt already ranked. The law as I have thus stated it received effect as to a claim of retention in the well-considered case of *Christie* v. *Keith*, 1838, 18 Sh. 1224; and again as to the right to securities on the estate of the bankrupt in the case of cautioners—*Jamieson* v. *Forrest*, 2 R. 701. And the law is so laid down by Professor Bell in his Commentaries—vol i., p. 348 of the fifth edition, in note 1, and also in the concluding paragraph of the text, both on that page—in clear terms. In the text, p. 347–8, Professor Bell says:—If the creditors have been already admitted to rank on the funds of the

bankrupt, the cautioner is not also to be admitted." But in the note to this passage what has been thus stated is thus qualified:—"It will be recollected, however, that the subject under discussion is only the claim of indemnification against the general fund. The cautioner may have *security* for his indemnification (1) by heritable security, (2) by pledge or other security on moveables, (3) by retention or compensation. In all of these cases he will be entitled to a total relief so far as his security reaches." Professor Bell adds in the text, p. 348—"Sometimes it happens that one of the cautioners has a security on the estate of the principal debtor for his own safety. And it may be questioned what shall be the effect of it on the one hand as against the creditor of the principal debtor, and on the other as against the favoured cautioner? As to the creditors of the principal debtor, no exception can be taken by them against the operation of the security to the full extent. That security would undoubtedly be available to the favoured cautioner if called upon to pay the whole debt. Nor could he claim any right of relief against the co-cautioners while he held the funds or security of the principal. They would be entitled to defend themselves on the ground that holding funds of the debtor sufficient to extinguish the debts he cannot claim from them more than the balance."

Applying the principles now stated to the present case, and assuming, in the first place, that there was bankruptcy on the part of M'Allum & Company, it follows that although the trustee for their creditors could effectually resist a claim by the appellant to a ranking in respect of the bills for £4541, on the ground that these bills had already been ranked under the bank's claim, and this would involve a double ranking, yet if M'Allum & Company's trustee made a claim against Hannay & Sons' estate for a separate debt he might be met by a claim of retention or compensation to the extent of the dividends paid on the bills for £4541, if there were nothing else in the case—I mean no proper debt of Hannay & Sons' which had been ranked on M'Allum & Company's estate. If, again, M'Allum & Company be taken as solvent, Hannay & Sons' trustee would be entitled not only to retain the amount of dividends paid on M'Allum & Company's acceptances for £4541 as a deduction from any claim M'Allum & Company might have on other transactions, but even to claim payment and relief of the dividends so paid, assuming always that M'Allum & Company had not been compelled to pay any proper debt of Hannay & Sons, for in the case of M'Allum & Company's solvency there could be no objection to the claim on the ground of double ranking.

The material fact in this case to which it appears to me your Lordship's judgment fails to give its proper effect is this—that when the claim of retention is made it is met by the reply that the payments on account of the debt of £4541 cannot be reared up as the ground of such a claim, because these payments were themselves more than compensated by the larger amount paid by M'Allum & Company on Hannay & Sons' dishonoured acceptances for £9000. If bankruptcy of both parties be assumed, it is conceded at all hands this must be the result. If, however, M'Allum & Company are to be regarded as solvent, it seems to me that equity demands that the result should be the same. The claim for £6407 is in itself an admitted debt. But M'Allum & Company have another claim against Hannay & Sons' estate for the sum they have paid on the £9000 of acceptances dishonoured by that firm. They cannot be allowed to claim and rank for this sum on Hannay & Sons' estate, because these bills having already been the subject of a claim by the bank which held them; this would involve a double ranking. M'Allum & Company do not propose to make a claim or ask a ranking. However, what they seek to do is to resist the appellant's proposal to retain a fund due to them for a debt which in a question with them they hold to be compensated by the larger payments they made for the bankrupt. It appears to me that their argument to this effect is well founded, and that as retention or compensation may be successfully maintained to indemnify a creditor in the cases I have already mentioned, so compensation should be sustained as against the appellant's claim of retention on the ground of the dishonoured bills for £9000 on which M'Allum & Company have been required to make large payments. It appears to me to be only equitable that the appellant should be restrained from the exercise of any right of retention as against a person or company who has paid a larger amount on a debt truly due by the bankrupt, even though that debt being constituted by bills has been already ranked on a claim by the billholders.

The case of *Gibb* v. *Brock* is no doubt in its result to a contrary effect. That case does not aid the appellant if in the present case M'Allum & Company are to be taken as having been bankrupt, or if the appellant is precluded by what occurred from maintaining that they are to be regarded as solvent in a question with him. If they are to be taken as solvent, the case has no doubt a somewhat direct bearing. It is, however, in one essential feature distinguishable from the present in this respect, that the bills there in question were accommodation bills on both sides of the account, and special rules are observed as to the ranking of such bills. In this case the whole transactions were of an onerous character. The decision itself, however, which, so far as I am aware, has not been followed by any similar judgment till the present, is in my opinion very unsatisfactory—the best, because the fullest amount of the argument is to be found in the report in the Faculty Collection, but that report does not give a word of the Judges' opinions, while the report in Shaw, which does give the opinions, contains no grounds or reasons for the conclusion at which the Judges arrived. In these circumstances I have felt myself at liberty to form and express my own opinion in the present case; and on the three several grounds I have stated I think the judgment of the Sheriff-Substitute should be adhered to and the appeal dismissed.

The Lords recalled the interlocutor of the Sheriff-Substitute, and ordained the appellant to rank the respondent on the estates of Hannay & Sons, and the partners thereof, in terms of the opinion of the majority of the Court.

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